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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. —— 525

STATE OF WISCONSIN, ex rel.
JAMES R. MATTISON,

Appellee,

vs.

ALFRED J. BAUDHUIN,

Appellant.

JURISDICTIONAL STATEMENT

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INDEX

	Page
Reports of Opinion in Lower Court	1
Grounds on which Jurisdiction is Invoked	1
Questions Presented on this Appeal	5
Statement of the Case	6
The Federal Questions presented are Substantial	11
I. The application of Section 12.17, Wisconsin Statutes, in the Case at Bar Would Infringe Appellant's Constitutional Rights	11
II. Section 12.22 (1) and (2), Wisconsin Statutes, are Invalid in that they Fail to Provide the Accused with Notice and Hearing on the Question of Whether the Conducting of an Ouster Proceeding in Circuit Court should be Authorized	12
III. Conclusion	14
Appendix	
Decision of trial court	15
Decision of Wisconsin Supreme Court	27
Judgment of Wisconsin Supreme Court	33

Cases Cited

Bridges v. California, (1941) 314 US 252	2
Ekern v. McGovern, 154 Wis. 147, 254	11
Herndon v. Lowry, (1937) 301 US 242	2
John F. Jelke Co. v. Beck, 208 Wis. 650, 666	10

Page

Mullane v. Hanover Trust Co., (1950) 339 US 306..2, 13

Schneck v. U.S., (1919) 249 US 47 2

State ex rel. Hampel v. Mitten, 227 Wis. 598, 607-608 10

State ex rel. La Follette v. Kohler, 200 Wis. 518, 570 .....10, 11

State ex rel. Mattison v. Baudhuin, 270 Wis. 249, 70 N.W. (2d), 674 1

Taylor v. Buckham, 178 U.S. 547, 1142 ed. 1187, 1200 11

Statutes Cited

Tit. 28 U.S.C. §1257 (2) 2

Section 12.17, Wisconsin Statutes.....2, 4, 5, 6, 11

Section 12.22, Wisconsin Statutes.....1, 3, 4, 5, 6, 11, 13

Section 12.23, Wisconsin Statutes..... 4

Section 12.24, Wisconsin Statutes.....4, 5, 6

Constitutions

Article I, Section III, Wisconsin Constitution..... 9

First, Fifth and Fourteenth Amendments, Constitution of the United States 4, 9, 12

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JAMES R. MATTISON,

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vs.

ALFRED J. BAUDHUIN,

Appellant.

JURISDICTIONAL STATEMENT

REPORTS OF OPINION IN LOWER COURT

Decision rendered June 1, 1955. *State ex rel. Mattison v. Baudhuin*, 270 Wis. 249 (Adv. Sheets) 70 N.W. (2d), 674.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. This case involves a proceeding pursuant to Section 12.22 (1) (2), Wisconsin Statutes, to have declared void the election of the appellant as Town Chairman of the Town of Granville, Milwaukee County, Wisconsin, and

to oust the appellant from said office because of his alleged violation of Section 12.17, Wisconsin Statutes, which prohibits the making of false statements of fact by a candidate during the course of his campaign for election to office. The constitutionality of these statutes and of their application in the instant case was challenged by demurrer in the trial court. The trial court and the Supreme Court of Wisconsin ruled that there was no unconstitutionality. This appeal from the ruling of the latter court is being taken pursuant to Tit. 28 U.S.C., §1257 (2).

2. The date of the judgment or decree sought to be reviewed is June 1, 1955, and the time of its entry is June 1, 1955. On September 12, 1955, the appellant's motion for rehearing was denied. Notice of Appeal was filed on September 20, 1955, in the Supreme Court of the State of Wisconsin.

3. The statutory provision conferring jurisdiction of this appeal on the Supreme Court of the United States is Tit. 28 U.S.C, §1257 (2).

4. The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States:

Schneck v. U.S., (1919) 249 US 47.

Herndon v. Lowry, (1937) 301 US 242.

Bridges v. California, (1941) 314 US 252.

Mullane v. Hanover Trust Co., (1950) 339 US 306.

5. The following Statutes are being challenged:

Section 12.17, Wisconsin Statutes (Vol. 1, Page 155):

"No person, firm or corporation shall knowingly make or publish, or cause to be made or published,

any false statement in relation to any candidate, which statement is intended or tends to affect any voting at any primary or election."

Section 12.22, Wisconsin Statutes (Vol. 1, Page 156):

"(1) If any elector of the state shall have within his possession information that any provision of this chapter, has been violated by any candidate for which such elector had the right to vote, or by any personal campaign committee of such candidate, or any member thereof, he may, by verified petition apply to the county judge of the county in which such violation occurred, to the attorney-general of the state, or to the governor of the state, for leave to bring a special proceeding to investigate and determine whether or not there has been such violation by such candidate or by such committee or member thereof, and for appointment of special counsel to conduct such proceeding in behalf of the state.

"(2) If it shall appear from such petition or otherwise that such candidate, committee or member thereof has violated any provision of this chapter, and that sufficient evidence is obtainable to show that there is probable cause to believe that such proceeding may be successfully maintained, then such judge or attorney-general or governor, as the case may be, shall grant leave to bring such proceeding and shall appoint special counsel to conduct such proceeding.

"(3) If such leave be granted and such counsel appointed such elector may, by a special proceeding brought in the circuit court in the name of the state upon the relation of such elector, investigate, and said court shall determine whether or not such candidate, committee or member thereof, has violated any provision of this chapter; but nothing contained in this chapter shall be considered as limiting in any way the effect, or as preventing the operation, of any other existing remedy."

Section 12.23 (1), Wisconsin Statutes (Vol. 1, Page 156):

> "(1) In such proceeding the complaint shall be served with the summons, and shall set forth the name of the person whose election is contested, and the grounds of the contest in detail, and shall not thereafter be amended except by leave of the court. The summons and complaint in the proceeding shall be filed within five days after service thereof."

Section 12.24 (1), Wisconsin Statutes (Vol. 1, Page 156):

> "(1) If the court shall find that the candidate whose right to any office is being investigated, or his personal campaign committee or any member thereof has violated any provision of this chapter, in the conduct of the campaign for nomination or election, and if such candidate is not one mentioned in subsection (2) hereof, judgment shall be entered declaring void the election of such candidate to the office for which he was a candidate, and ousting and excluding him from such office and declaring the office vacant. * * * "

6. It is the position of the appellant that Section 12.17 and Section 12.22 (1) (2), Wisconsin Statutes, are repugnant to the First, Fifth and Fourteenth Amendments of the Federal Constitution in that they infringe the appellant's right to freedom of the press and deprive him of property without due process of law. It is the further contention of the appellant that if the court should see fit to declare such statutory provisions constitutional per se, that then and in that event the application of said statutes to the appellant in the case at bar would infringe appellant's constitutional right to freedom of the press and deprive him of his property without due process of law.

QUESTIONS PRESENTED ON THIS APPEAL

In the case at bar a proceeding was commenced against the appellant to have the election of the appellant as Town Chairman of the Town of Granville, Milwaukee County, Wisconsin, declared void and to oust him from said office because he allegedly made false statements relating to his rival in the campaign preceding his election. The statute prohibiting such statements is Section 12.17, Wisconsin Statutes, and the statute providing for ouster from office is Section 12.22 (1) (2), Wisconsin Statutes. The following questions are presented by this appeal:

(1) Is Section 12.17, Wisconsin Statutes, repugnant to the First, Fifth or Fourteenth Amendments of the Constitution of the United States?

(2) If Section 12.17, Wisconsin Statutes, is valid, is the application thereof coupled with the application of Sections 12.22 - 12.24, Wisconsin Statutes, in the case at bar such as would infringe Appellant's constitutional rights to freedom of the press and due process of law in the publication of political campaign literature?

(3) Have the decisions of the Supreme Court of the State of Wisconsin construed Section 12.17, Wisconsin Statutes, in such a manner as to create a standard inhibiting freedom of the press which is so vague as to constitute an unconstitutional infringement of Appellant's right to freedom of the press?

(4) Is Section 12.22, (1) and (2), Wisconsin Statutes, invalid in that it fails to provide the accused with Notice and Hearing on the question of whether the conducting of an Ouster Proceeding in Circuit Court should be authorized?

STATEMENT OF THE CASE

This case is an action commenced under Sections 12.22-12.24, Wisconsin Statutes, and seeks ouster of the appellant as chairman of the Board of Supervisors of the Town of Granville and for judgment invalidating the election of the appellant to that office because of alleged violations of Section 12.17, Wisconsin Statutes.

The appellant, Alfred J. Baudhuin, was re-elected Town Chairman of the Town of Granville on April 6, 1954, by a vote of 1866 to 968. In the campaign which preceded the election, his opponent, Evan J. Sells, sent a letter to the electorate, attacking Mr. Baudhuin. Mr. Baudhuin replied with a letter of his own, which is the subject matter of this action. (A-Ap. p. 121, R. p. 9).

Subsequent to the defeat of Mr. Sells in the election of April 6, 1954, his attorney, James R. Mattison, caused this action to be commenced against Mr. Baudhuin for the purpose of setting aside his election to the office of Town Chairman on April 6, 1954. A Summons and Complaint were served upon the appellant, Mr. Baudhuin, and he joined issue by serving and filing his demurrer to said Complaint.

The Complaint alleges that a certain letter of Mr. Baudhuin published in connection with the campaign preceding the election of April 6, 1954, contains misstatements of fact which had an effect upon the aforesaid election. For the purpose of convenience we denominate these alleged misstatements of fact as the following two categories: (1) the Annexation Issue; and (2) the Alimony Issue.

The language complained of relative to the Annexation Issue is the following:

"THE REAL REASON FOR MR. SELLS' CANDIDACY. You have noticed in his public statements that Mr. Sells has advocated the *consolidation of functions* by the municipalities of Milwaukee County. As you know, this idea is the brain-child of Walter J. Mattison, the City Attorney of the City of Milwaukee. This proposal is designed to be the first phase of a gigantic program for the annexation of the Town of Granville to the City of Milwaukee. It is interesting to note that the attorney for Mr. Sells is James R. Mattison, the son of the City Attorney of the City of Milwaukee. Have you ever heard of a more clever Fifth Column movement within the Town of Granville? In the event Mr. Sells is elected as Town Chairman you can expect the Town of Granville to be surrendered without a fight to the City of Milwaukee (with its known exorbitant tax policy). Walter J. Mattison, as City Attorney for the City of Milwaukee, will likely 'negotiate', with his son, James R. Mattison, the attorney for Mr. Sells, and the Town of Granville will be 'sold down the river'! This interesting alliance has never been brought to the attention of the people of the Town of Granville."

Relative to this language the Complaint alleges as follows:

"This portion of said article was untrue in the following respects:

"The promotion of a plan for consolidation of functions by municipalities in Milwaukee County was not the 'real reason' or any reason for the aforesaid candidacy of Evan J. Sells.

"The proposal of such consolidation of municipal functions was not designed by said Evan J. Sells to be the first phase of a gigantic program, or any program, for the annexation of the Town of Granville to Milwaukee. Evan J. Sells never participated in any plan of annexation of said township to the city

of Milwaukee, but always opposed any such annexation.

"Evan J. Sells was never part of any 'Fifth Column movement in the Town of Granville' or any other movement in connection with annexation or any other similar plan or policy. No such movement in fact exists.

"The foregoing statements designated as false in paragraph 5, and each of them, were known by the defendant to be false when Exhibit A was prepared and circulated, as aforesaid, as relator is informed and verily believes."

The language complained of relative to the Alimony Issue is the following:

"However in the event you do not wish to accept at face value the sworn statements of Mrs. Sells regarding the failure of Mr. Sells to support his wife and children, I invite your attention to the alimony card on file in the office of the Clerk of the Circuit Court under Case No. 238-746. This card shows an arrearage in alimony and support money for his minor children on the following dates as follows:

November 30, 1953	$2,000.00
December 22, 1953	2,100.00
January 2, 1954	2,100.00

"All these statements are taken directly from the public records of the Milwaukee County Circuit Court and may be examined by anyone. Now, I ask you, do you want a man who does not support his own little children to be the steward for the responsibilities of the Town Government? Mr. Sells has the audacity of holding himself forward to the people of our Town as being a proper person to discharge public responsibilities. Do you not agree that this man should first put his own house in order

before he attempts to conduct your Town affairs? If a person cannot meet his own personal responsibilities, how can he hope to adequately carry public responsibilities?"

Relative to this language the Complaint alleges:

"This portion of said article was untrue in the following respects:

"Neither the alimony card in question nor the public records of the Milwaukee County Circuit Court showed that Evan J. Sells was in arrears in alimony and support money for his minor children on November 20, 1953, in the sum of $2000.00, or on December 22, 1953, in the sum of $2100.00, or on January 2, 1954, in the sum of $2100.00.

"Evan J. Sells was not in fact in arrears on said dates, or any of them, in alimony and support money for his minor children in said sums or any of them, or in any substantial sum whatsoever."

The appellant demurred to the Complaint on the grounds: "That the same does not state facts sufficient to constitute a cause of action; that the relief sought by the plaintiff in the Complaint herein would infringe the defendant's right to freedom of the press and deprive him of his property rights without due process of law contrary to the inhibitions of Article I, Section III, of the Wisconsin Constitution and of the First, Fifth and Fourteenth Amendments of the Constitution of the United States."

The demurrer was tried before the Circuit Court of Milwaukee County which filed its written decision and order overruling the demurrer and expressly finding that the challenged statutes are constitutional. The pertinent part of the decision reads as follows:

"Freedom of speech and of the press is guaranteed by the federal and state constitutions. Such rights,

however, are not absolute and they are subject to valid regulatory powers of government. Freedom of speech and the press implies the right to utter and publish whatever a citizen may please, so long as it is not harmful in its character when tested by such standards as the law raises. It was not intended that these guaranties were to constitute an absolute license to speak and publish everything that one pleases, freed from all legal liability therefor. *John F. Jelke Co. v. Beck,* 208 Wis. 650, 666.

"The constitutional guaranties are subject to the government's legitimate exercise of the police power, pursuant to which, and without abridging the freedom of speech and of the press, the state may enact reasonable regulations in order to prevent fraud. Laws reasonably regulating elections do not abridge freedom of speech nor of the press. *State ex rel. La Follette v. Kohler,* 200 Wis. 518, 570; *State ex rel. Hampel v. Mitten,* 227 Wis. 598, 607-608. The statute does not forbid full and fair discussion of the merits of candidates for political office. It prohibits misstatements such as heretofore referred to. The purpose of the statute in question is to secure purity of and in elections of our public officials and that the public is not misled at the polls by false statements of fact knowingly made to the electors by a candidate regarding another candidate for the same office.

"The defendant contends that the statutes, if construed to apply to this case, would deprive him of his property rights without due process of law, contrary to the 5th and 14th Amendments to the federal constitution. He will be deprived of no property rights if it is established that violations of the act occurred, resulting in an ouster, because in that event he never acquired title to the office, and no term is shortened because he then was never elected; for, in that case, he is but an intruder and his term as such would be terminated. That is not a property right. *State ex rel. La Follette v. Kohler,* 200 Wis. 518, 552. A

> property right to be entitled to the protection of the 'due process' clause must be a vested property right. A claim to public office is not a vested right. *Ekern v. McGovern*, 154 Wis. 147, 254. The United States Supreme Court has held that a public office was not property and that it could be affected by subsequent legislation. *Taylor v. Buckham*, 178 U.S. 548, 1142 ed. 1187, 1200. The procedure prescribed by the statutes in question complies with the essential elements of 'due process'." (A-Ap. pp. 24-26, R. pp. 24-26).

The Supreme Court of the State of Wisconsin examined the decision of the trial court stating, in its opinion, as follows:

> "The constitutional objections to the statute raised herein have been considered and determined by this court in prior cases, particularly in *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 228 N.W. 895. A thorough statement of the constitutional objections to ch. 12, Stats., and a discussion of the many cases that have determined the objections to be without merit would unduly lengthen this opinion." (A-Ap. pp. 32, 33, R. p. 37).

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The Application of Section 12.17, Wisconsin Statutes, in the Case at Bar Would Infringe Appellant's Constitutional Rights.

We take no issue with the truism that freedom of expression is not an absolute right. In political campaigns freedom of expression is delimited by the provisions of Section 12.17, Wisconsin Statutes. However, the limitation only inhibits the intentional making of misstatements

of *fact* affecting elections. Even giving the respondent's Complaint the benefit of every doubt, it is clear that the same does not allege a misstatement of *fact* relative to the Annexation Issue and the Alimony Issue. The paragraphs in the letter relating to the Annexation Issue and the Alimony Issue consist exclusively and obviously of comment, criticism, question and prediction. If anything contained in Mr. Baudhuin's letter should be construed to be a misstatement of *fact* relative to the Annexation Issue or the Alimony Issue and therefore actionable, doing so would certainly infringe the appellant's freedom of press and freedom of expression to such an extent as to be repugnant to the rights guaranteed by the First and Fifth Amendments of the Federal Constitution. In the event the appellant should be ousted from his office for anything set forth in his letter, he would of necessity lose the emoluments appertaining to said office for the balance of his term. The compensation which one receives in one's occupation certainly constitutes property the rights of which are protected by the Fourteenth Amendment of the Federal Constitution. To deprive the appellant in the instant case of such compensation would of necessity deprive him of his property without due process of law.

II.

Section 12.22 (1) and (2), Wisconsin Statutes, Are Invalid in That They Fail to Provide the Accused With Notice and Hearing on the Question of Whether the Conducting of an Ouster Proceeding in Circuit Court Should be Authorized.

Providing a person with notice of any proceeding in which his rights, especially his property rights, are involved and further providing him with the opportunity

to be heard in such proceeding are basic essentials of our jurisprudence. These essentials are, in fact, found throughout the woof and warp of our law. Perhaps the most celebrated recent authority on the subject is *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306. Although we do not contend that Chapter 12 of the Wisconsin Statutes, in its entirety, is unconstitutional, it seems clear that Section 12.22 (1) and (2), thereof do fail to meet those minimum requirements of notice and hearing which are basic to our Anglo-American legal tradition of fairness. Under those two subsections the authorization for the commencement of an ouster proceeding can be procured by the issuance of an *ex parte* order by the County Judge upon the filing with him of a petition alleging a violation of Chapter 12. In fact, no provision for a hearing on such petition is even authorized by the Statute. This evil certainly is not cured by the fact that the accused can, after the authorization of the ouster proceeding, appear in Circuit Court to defend himself. The authorization of the ouster proceeding alone is a serious blow to the reputation of the accused regardless of the ultimate outcome of the proceeding. Accordingly, the elected candidate should be given notice of the filing of a petition for an ouster proceeding and he should be given an opportunity to be heard before such a proceeding is authorized by the County Judge. The subsections of the Statute, failing to so provide, are invalid in that they fail to provide the elected candidate with procedural due process of law in a proceeding which affects his property rights, to-wit, the emoluments appertaining to his office.

III.

CONCLUSION

It is clear from the foregoing that the grounds upon which this appeal rests are substantial and consequently present substantial Federal questions. It is clear that the trial court erred in failing to sustain the appellant's demurrer, the appellant's constitutional rights being thereby infringed. It was further error for the Supreme Court of the State of Wisconsin to affirm the ruling of the trial court. The ruling of the Supreme Court on the constitutional issues involved is final. The only relief available to the defendant must come from the Supreme Court of the United States. Accordingly, it is only proper that said court grant the appeal plenary consideration and authorize briefs on the merits and oral argument. Therefore, an order should be entered noting probable jurisdiction and requiring a hearing on the merits of the case before the Supreme Court of the United States.

Respectfully submitted,

LAWRENCE G. WICKERT and
HAROLD H. FUHRMAN,
Attorneys for Appellant,
Alfred J. Baudhuin.

APPENDIX

State of Wisconsin : Circuit Court : Milwaukee County

Case No. 249-808

STATE OF WISCONSIN, on relation of JAMES R. MATTISON,

Plaintiff.

vs.

ALFRED J. BAUDHUIN,

Defendant.

DECISION

Proceeding under Chapter 12, Wisconsin Statutes, particularly sections, 12.17, 12.22, 12.23 and 12.24 thereof. The defendant's demurrer to the complaint will be overruled with leave to the defendant to serve and file an answer to the complaint within ten days after service of a copy of the order overruling the demurrer upon his attorneys, upon condition that the sum of Ten Dollars, as terms, be paid to the plaintiff's attorney at or before the service of such answer, the receipt thereof to be endorsed thereon.

In passing upon a general demurrer to the complaint, the court can look only to the facts disclosed within the four corners of the complaint and, therefore, can give no consideration to the extraneous facts, if so, sought to be

brought before the Court in defendant's brief. Such pleaded facts will be briefly summarized.

Relator is and was an elector in the township of Granville, entitled to vote for the chairman of the board of supervisors of that township at the election held to fill that office on April 6, 1954. Defendant and one Evan J. Sells were chosen at the primary election held on March 9, 1954, as the two candidates for such office at such April 6, 1954 election.

In the campaign preceding the April 6, 1954 election, and as a part of said campaign, defendant issued and distributed to the electors of said township on or about April 3, 1954, through the United States mails, approximately 2500 copies of an article, a copy of which, in full, is a part of the complaint as Exhibit "A". In the first paragraph of that article, defendant states that Evan J. Sells recently sent a letter to the voters of the town, attacking defendant, which letter he, defendant, was answering.

The complaint alleges that the article contained false and misleading statements of fact, and specifically makes two quotations, and alleges that they were untrue in the respects alleged, as follows:

"(1) (a) As appears from said Exhibit A, the defendant made the following statement in said article:

> 'However in the event you do not wish to accept at face value the sworn statements of Mrs. Sells regarding the failure of Mr. Sells to support his wife and children, I invite your attention to the alimony card on file in the office of the Clerk of the Circuit Court under Case No. 238-746. This card shows an arrearage in alimony and support money

for his minor children on the following dates as follows:

November 30, 1953	$2,000.00
December 22, 1953	$2,100.00
January 2, 1954	$2,100.00

'All these statements are taken directly from the public records of the Milwaukee County Circuit Court and may be examined by anyone. Now, I ask you, do you want a man who does not support his own little children to be the steward for the responsibilities of the Town Government? Mr. Sells has the audacity of holding himself forward to the people of our Town as being a proper person to discharge public responsibilities. Do you not agree that this man should first put his own house in order before he attempts to conduct your Town affairs? If a person cannot meet his own personal responsibilities, how can he hope to adequately carry public responsibilities?'

"(b) This portion of said article was untrue in the following respects:

"Neither the alimony card in question nor the public records of the Milwaukee County Circuit Court showed that Evan J. Sells was in arrears in alimony and support money for his minor children on November 20, 1953, in the sum of $2000.00, or on December 22, 1953, in the sum of $2100.00, or on January 2, 1954, in the sum of $2100.00.

"Evan J. Sells was not in fact in arrears on said dates, or any of them, in alimony and support money for his minor children in said sums or any of them, or in any substantial sum whatsoever.

"(2) (a) As appears from said Exhibit A, the defendant also made the following statement in said article:

'THE REAL REASON FOR MR. SELLS' CANDIDACY. You have noticed in his public statements that Mr. Sells has advocated the *consolidation of functions* by the municipalities of Milwaukee County. As you know, this idea is the brainchild of Walter J. Mattison, the City Attorney of the City of Milwaukee. This proposal is designed to be the first phase of a gigantic program for the annexation of the Town of Granville to the City of Milwaukee. It is interesting to note that the attorney for Mr. Sells is James R. Mattison, the son of the City Attorney of the City of Milwaukee. Have you ever heard of a more clever Fifth Column movement within the Town of Granville? In the event Mr. Sells is elected as Town Chairman you can expect the Town of Granville to be surrendered without a fight to the City of Milwaukee (with its known exorbitant tax policy). Walter J. Mattison, as City Attorney for the City of Milwaukee, will likely 'negotiate' with his son, James R. Mattison, the attorney for Mr. Sells, and the Town of Granville will be "sold down the river". This interesting alliance has never been brought to the attention of the people of the Town of Granville.'

"(b) This portion of said article was untrue in the following respects:

"The promotion of a plan for consolidation of functions by municipalities in Milwaukee County was not the 'real reason' or any reason for the aforesaid candidacy of Evan J. Sells.

"The proposal of such consolidation of municipal functions was not designed by said Evan J. Sells to be the first phase of a gigantic program, or any program, for the annexation of the Town of Granville to Milwaukee. Evan J. Sells never participated in any plan of annexation of said township to the City of Milwaukee, but always opposed any such annexation.

"Evan J. Sells was never part of any 'Fifth Column movement in the Town of Granville' or any other movement in connection with annexation or any other similar plan or policy. No such movement in fact exists."

The complaint then alleges that such statements were known by defendant to be false when the article was prepared and circulated; that each of them naturally tended to and did induce many of the electors of said township to vote against said Sells at the April 6, 1954 election for such office of Chairman and were intended by defendant to have such effect; that as a result, defendant was in form elected to, and said Sells was defeated for, said office; that defendant thereupon assumed the office and has since functioned therein.

The compiaint then alleges that each of such statements was a violation of section 12.17, Wisconsin Statutes, and the action is brought to procure the relief provided by section 12.24, Wisconsin Statutes, so far as said office of Chairman is concerned.

Section 12.17, Wisconsin Statutes, 1953, reads:

> "No person, firm or corporation shall knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, which statement is intended or tends to affect any voting at any primary or election."

Special proceedings are provided by the legislature relative to any violation of any provision of Chapter 12, in and by sections 12.22, 12.23 and 12.24, Wisconsin Statutes. Being a Statutory proceeding, the procedure therein provided must be followed. 29 C.J.S. 355. Under section 12.23, the only pleadings are the complaint and the answer to the complaint. No provision is made for de-

murrer to the complaint. It is obvious that the legislature intended an expeditious disposition of the matter; no doubt, in order that the matter be decided as soon as possible so as to either clear the challenged party or to have him removed before too much of the term elapsed. Such intention appears from the provisions that the complaint can be amended only by leave of the court; the summons and complaint must be filed within five days after service; the answer to the complaint must be served and filed within ten days after the service of the summons and complaint; any allegation of new matter in the answer shall be deemed controverted without reply, the proceeding is at issue by the answer and stands ready for trial upon five-days' notice; the proceeding has precedence over any civil cause of a different nature pending in the court. The small amount allowed for the services of the special counsel, under section 12.25, also indicates that there should be no dilatory proceedings.

The weight of, and what appears to be the sounder authority, is that the initial pleadings in an election contest are not subject to the rules of pleading in civil actions. See *Kennison v. Du Plantis*, Tex. Civ. App. 220 S.W. 118; *Wilburn v. Galloway* (Tex. Civ. App.) 179, S.W. (2d) 540; *Gonzales v. Gallegos*, 10 N. Mex. 372, 62 P. 1103; *Smihy v. Lenane*, 363 Ill. 66, 1 N.E. (2d) 213. In each case the proceedings provided for by the statute control. The Wisconsin Statutes, referred to, are peculiar in that the only pleadings specifically provided for are the summons and complaint and the answer. The legislative intention thus appears that such contests should be speedily determined so that a rightful person may enjoy as nearly as practicable the entire term. Such de-

termination can be delayed by interposing a demurrer. This with an appeal from the order thereon could use up much, if not all, of a short term involved. No doubt, that is why no provision was made for demurrer.

Because the question of whether or not a demurrer will lie in such proceedings has never been determined, although there are a number of reported cases in which a demurrer was interposed, the court prefers not to place its determination upon that ground and will pass upon the grounds of the demurrer.

On demurrer, the allegations of the complaint must be construed most favorably to the pleader. *Nelson v. La Crosse Trailer Corp.*, 254 Wis. 414, 417. Allegations upon information and belief, sufficient to make a cause of action, do not render the pleading demurrable. *Northwestern College v. Watertown B & L Assn.*, 204 Wisconsin 214, 216. The plaintiff need not anticipate defenses, nor set up allegations which the defendant can include in his answer. *Flambeau River L. Co. v. Lake Superior D. P. Co.*, 200 Wis. 31, 35; *Eiche v. Wallrabenstein*, 215 Wis. 311, 314. A general demurrer admits that all the material allegations of fact are true. *Graf v. Seymour State Bank*, 221 Wis. 122, 127. A general demurrer to a complaint challenging the constitutionality of a statute does not admit the allegations of the complaint to be true, *Ritholz v. Johnson*, 244 Wis. 494, 489,— for that purpose.

The statutes involved are to be liberally construed — *State ex rel Pelishek v. Washburn*, 223 Wis. 595, 598 — and so construed, it must be held that, upon the allegations of fact appearing in the complaint, a cause of action, that is a violation of section 12.17, Wisconsin Statutes, is stated upon the face thereof.

The article stated that the alimony card showed Mr. Sells was in arrears in alimony and support money for his minor children on certain stated dates and amounts. The complaint alleges that neither the alimony card nor the public records showed that Mr. Sells was in arrears on such dates and for such amounts and, in fact, was not in arrears on said dates for any substantial sum whatsoever. The statement in the article purported to be a statement of an existing fact, and the complaint sufficiently alleges that it was a false statement.

The article stated that, in his public statements, Mr. Sells has advocated the consolidation of functions by the municipalities of Milwaukee County; that this idea is the brain-child of Walter J. Mattison, the City Attorney of the City of Milwaukee; that "this proposal is designed to be the first phase of a gigantic program for the annexation of the Town of Granville to the City of Milwaukee. It is interesting to note that the attorney for Mr. Sells is James R. Mattison, the son of the City Attorney of the City of Milwaukee. Have you ever heard of a more clever Fifth Column movement within the Town of Granville? * * * This interesting alliance has never been brought to the attention of the people of the Town of Granville". These were statements of purported facts; not of innuendo nor of mere opinion only; and not merely of comment or criticism.

The complaint alleges that such portions of the article were untrue; that the promotion of a plan for consolidation of functions by municipalities in Milwaukee County was not a reason for Mr. Sells' candidacy; that the proposal of consolidation was not designed by him; that he never participated in any plan of annexation; and that he was never part of any "Fifth Column movement in the

Town of Granville" nor of any other movement referred to.

The demurrer is upon the ground that the complaint upon its face does not state facts sufficient to constitute a cause of action; that the relief sought would infringe the defendant's right of Freedom of the Press and deprive him of his property rights without due process of law, contrary to Article I, section III, Wisconsin Constitution, and the 1st, 5th and 14th Amendments of the United States Constitution.

The court has considered those objections and believes that none of them can be sustained.

The defendant contends that the matters are within the language of *State ex rel Hampel v. Mitten*, 227 Wis. 598, 605, where the court construed the statutes as to deny "ouster in all cases where the violations were either technical, insubstantial, or trivial, or where from the very nature of the violation the minds of the electors could neither have been corrupted nor misled * * * " It is considered that the matters stated as facts in the article in question were neither technical, insubstantial nor trivial. From the many contested annexations in Milwaukee County within recent years, the court can take, and does take, judicial notice of the feelings of a substantial number of electors in the Town of Granville against annexation of territory in the Town to the City of Milwaukee. The minds of such electors could well have been corrupted or misled against Candidate Sells by such statements, if untrue, as alleged in the complaint they were.

The statements in question, if untrue, are considered to be within the language of the Hampel case, page 605, "that a deliberate, wilful, intentional violation of the

act which upon its face has a natural tendency to voters makes it impossible to ascertain the true will of the electors and carries with it the penalty of ouster". At pages *609-610,* the court stated that "It is our conclusion the section 12.17 Stats. was intended to be limited to statements of facts * * * and statements of fact concerning a candidate, false and known to be such, may constitute a violation * * * provided they are intended to or tend to affect votes, and may be the basis for ouster unless they are demonstrably of a trivial and inconsequential character". In the Hampel case, the court concluded at page 610 that the statements relied upon fell within the field of comment. In the case at bar, such conclusion cannot be reached, in view of the inclusion in the complaint of a copy of the article or letter, in the Hampel case the alleged letter not having been made a part of the complaint nor sufficiently stated in the body of the complaint. In the case at bar, the entire article is attached as an exhibit, and the omission, as in the Hampel case, does not exist.

The defendant in his brief concurs with the proposition that freedom of speech or of expression is not an absolute right; that in political campaigns of freedom of expression is limited by the provisions of section 12.17 Statutes; and that the limitation inhibits the intentional making of misstatements of fact affecting or tending to affect the election. He contends, however, that no misstatements of fact relative to the annexation issue was made, and that what was said was but comment, criticism, question and prediction. As has been pointed out, certain of the statements were of purported facts which were more than as now claimed by the defendant.

Freedom of speech and of the press is guaranteed by the federal and state constitutions. Such rights, however,

are not absolute and they are subject to valid regulatory powers of government. Freedom of speech and of the press implies the right to utter and publish whatever a citizen may please, so long as it is not harmful in its character when tested by such standards as the law raises. It was not intended that these guarantees were to constitute an absolute license to speak and publish everything that one pleases, freed from all legal liability therefor. *John F. Jelke Co. v. Beck*, 208 Wis. 650, 666.

The constitutional guaranties are subject to the government's legitimate exercise of the police power, pursuant to which, and without abridging the freedom of speech and of the press, the state may enact reasonable regulations in order to prevent fraud. Laws reasonably regulating elections do not abridge freedom of speech nor of the press. *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 570; *State ex rel. Hampel v. Mitten*, 227 Wis. 598, 607-608. The statute does not forbid full and fair discussion of the merits of candidates for political office. It prohibits misstatements such as heretofore referred to. The purpose of the statute in question is to secure purity of and in elections of our public officials and that the public is not misled at the polls by false statements of fact knowingly made to the electors by a candidate regarding another candidate for the same office.

The defendant contends that the statutes, if construed to apply to this case, would deprive him of his property rights without due process of law, contrary to the 5th and 14th Amendments to the federal constitution. He will be deprived of no property rights if it is established that violations of the act occurred, resulting in an ouster, because in that event he never acquired title to the office, and no term is shotened because he then was never

elected; for, in that case, he is but an intruder and his term as such would be terminated. That is not a property right. *State ex rel. La Follette v. Kohler,* 200 Wis. 518, 552. A property right to be entitled to the protection of the "due process" clause must be a vested property right. A claim to public office is not a vested right. *Ekern v. McGovern,* 154 Wis. 147, 254. The United States Supreme Court has held that a public office was not property and that it could be affected by subsequent legislation. *Taylor v. Buckham,* 178 U.S. 548, 1142 ed. 1187, 1200. The procedure prescribed by the statutes in question complies with the essential elements of "due process".

The defendant's demurrer cannot be sustained, and will be overruled.

The plaintiff's attorney will prepare and submit for signature the order overruling demurrer, accordingly.

Dated this 8th day of December, 1954.

s/ Ronold A. Drechsler
Circuit Judge.

CC: Walter H. Bender
Wickert & Fuhrman

State of Wisconsin : : In Supreme Court

No. 298

August Term, 1954

State on relation of JAMES R. MATTISON,
Respondent,

v.

ALFRED J. BAUDHUIN,
Appellant.

APPEAL from an order of the circuit court for Milwaukee county: RONOLD A. DRECHSLER, Circuit Judge. *Affirmed.*

This is a special proceeding under the provisions of secs. 12.22 to 12.24, Stats., inclusive, to declare that the election of the defendant to the office of chairman of the board of supervisors of the town of Granville was void and that said defendant be ousted from said office.

The complaint alleged that the relator is and at all the times mentioned in the complaint was, an elector in the town of Granville and as such was entitled to vote for chairman of the board of supervisors of said town at the election held to fill said office on the 6th day of April, 1954; that the relator had filed a verified petition with one of the county judges of Milwaukee county setting forth alleged violations by the defendant of the provisions of sec. 12.17, Stats.; that said county judge made and entered an order reciting that it appeared that sufficient evidence was obtainable to show that a pro-

ceeding under ch. 12, Stats., may be successfully maintained, granting leave to the relator to bring such a proceeding, and appointing Walter H. Bender special counsel to conduct such proceedings in behalf of the State of Wisconsin. The complaint further alleged that the defendant and one Sells were the candidates for said office at the election to be held on April 6, 1954; that as part of the campaign preceding said election the defendant issued and distributed to the electors of said town through the United States mails approximately 2,500 copies of an article, a copy of which was attached to the complaint. Paragraph numbered 5 of said complaint is set out verbatim a follows:

"5. Said article contained false and misleading statements of fact, among which were the following:

"(1) (a) As appears from said Exhibit A, the defendant made the following statement in said article:

" 'However in the event you do not wish to accept at face value the sworn statements of Mrs. Sells regarding the failure of Mr. Sells to support his wife and children, I invite your attention to the alimony card on file in the office of the Clerk of Circuit Court under Case No. 238-746. This card shows an arrearage in alimony and support money for his minor children on the following dates as follows:

"November 30, 1953	$2,000.00
"December 22, 1953	$2,100.00
"January 2, 1954	$2,100.00

" 'All these statements are taken directly from the public records of the Milwaukee County Circuit Court and may be examined by anyone. Now, I ask you, do you want a man who does not support his own little children to be the steward for the responsibilities of the Town Government? Mr. Sells has the audacity of holding himself forward to the people of our Town as being a proper person to discharge

public responsibilities. Do you not agree that this man should first put his own house in order before he attempts to conduct your Town affairs? If a person cannot meet his own personal responsibilities, how can he hope to adequately carry public responsibilities?'

"(b) This portion of said article was untrue in the following respects:

"Neither the alimony card in question nor the public records of the Milwaukee County Circuit Court showed that Evan J. Sells was in arrears in alimony and support money for his minor children on November 20, 1953, in the sum of $2000.00, or on December 22, 1953, in the sum of $2100.00, or on January 2, 1954, in the sum of $2100.00.

"Evan J. Sells was not in fact in arrears on said dates, or any of them, in alimony and support money for his minor children in said sums or any of them, or in any substantial sum whatsoever.

"(2) (a) As appears from said Exhibit A, the defendant also made the following statement in said article;

" 'THE REASON FOR MR. SELLS' CANDIDACY. You have noticed in his public statements that Mr. Sells has advocated the *consolidation of functions* by the municipalities of Milwaukee County. As you know, this idea is the brain-child of Walter J. Mattison, the City Attorney of the City of Milwaukee. This proposal is designed to be the first phase of a gigantic program for the annexation of the Town of Granville to the City of Milwaukee. It is interesting to note that the attorney for Mr. Sells is James R. Mattison, the son of the City Attorney of the City of Milwaukee. Have you ever heard of a more clever Fifth Column movement within the Town of Granville? In the event Mr. Sells is elected as Town Chairman you can expect the Town of Granville to be surrendered without a fight to the City of Mil-

waukee (with its known exorbitant tax policy). Walter J. Mattison, as City Attorney for the City of Milwaukee, will likely "negotiate", with his son, James R. Mattison, the attorney for Mr. Sells, and the Town of Granville will be "sold down the river." This interesting alliance has never been brought to the attention of the people of the Town of Granville.'

"(b) This portion of said article was untrue in the following respects:

"The promotion of a plan for consolidation of functions by municipalities in Milwaukee County was not the 'real reason' or any reason for the aforesaid candidacy of Evan J. Sells.

"The proposal of such consolidation of municipal functions was not designed by said Evan J. Sells to be the first phase of a gigantic program, or any program, for the annexation of the Town of Granville to Milwaukee. Evan J. Sells never participated in any plan of annexation of said township to the city of Milwaukee, but always opposed any such annexation.

"Evan J. Sells was never part of any 'Fifth Column movement in the Town of Granville' or any other movement in connection with annexation or any other similar plan or policy. No such movement in fact exists."

The complaint further alleged that the statements designated as false in par. 5 were known by the defendant to be false when the article was prepared and circulated; that said statements naturally tended to and did induce many of the electors of said town to vote against Sells at said election and were intended by the defendant to have said effect. As a result the defendant was in form elected to said office, which he assumed, and that the publication of each of the statements designated as false

in par. 5 constituted and was a serious and substantial violation of sec. 12.17, Stats.

A demurrer was interposed to the complaint on the ground that the same does not state facts sufficient to constitute a cause of action and that the relief sought by the plaintiff would infringe certain constitutional rights of the defendant. An order was entered on December 20, 1954, overruling the demurrer, and the defendant appealed.

BROADFOOT, J. Section 12.17, Stats., reads as follows:

> "No person, firm or corporation shall knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, which statement is intended or tends to affect any voting at any primary or election."

The defendant contends that the complaint is fatally defective in that no copy of the alimony card referred to was attached to the complaint and in that it failed to plead the contents of Mr. Sells' letter to which the defendant's article was a reply. We can find no merit in this contention. The charges are based upon what was stated and published by the defendant in his article. The pleading of the other documents is defensive matter and did not have to be incorporated in the complaint.

The defendant next contends that the complaint is fatally defective for the reason that the denial of the alimony charges was in effect a negative pregnant. However, the complaint went farther than to deny the statements in the article only as to the exact dates and amounts that appeared therein. In addition the complaint alleged that Sells was not in fact in arrears in any substantial sum. The complaint sufficiently alleges that it was a false statement.

The defendant also contends that the gravamen of the statement with reference to the alimony card is the same as the statement of Mrs. Sells in her affidavit, which was not denied. This is not a valid objection to the complaint. If one candidate made several false statements about his opponent it would only be necessary to plead and prove the falsity of one of them, together with the other essential elements embraced within the statute, to succeed in the action.

It is next contended by the defendant that the statements complained of are not misstatements of fact but merely opinions, deductions, fears, or suspicions, and a prediction of doom. The defendant relies in particular upon certain language appearing in the case of *State ex rel. Hampel v. Mitten,* 227 Wis. 598, 278 N.W. 431. This court did state therein that where the violations of ch. 12 are either technical, insubstantial, or trivial, they will not support a judgment of ouster, but that a deliberate, willful, intentional and substantial violation of the act carries with it the penalty of ouster. In the Hampel Case it was determined that the statements complained of were not sufficiently pleaded as statements of fact, and in that case the order sustaining the demurrer to the complaint was affirmed.

The cases are factually different and the pleadings are materially different. The trial court held that the statements in question, if untrue, constitute a substantial violation of the statutes, and we agree therewith. Under the established rules of this court, in reviewing the complaint before us, which is challenged by demurrer, we must hold that the complaint alleges facts sufficient to constitute a cause of action, even though some of the allegations were made upon information and belief.

The constitutional objections to the statute raised herein have been considered and determined by this court in

prior cases, particularly in *State ex rel. La Follette v. Kohler,* 200 Wis. 518, 228 N.W. 895. A thorough statement of the constitutional objections to ch. 12 and a discussion of the many cases that have determined the objections to be without merit would unduly lengthen this opinion.

The plaintiff attempts to raise for the first time in this court the contention that a demurrer to a complaint in this type of special proceeding is not a permissible pleading. Although several ouster cases under the provisions of ch. 12, Stats., have been before this court on demurrer it does not appear that the issue has been raised or determined. However, this court has repeatedly refused to allow issues to be raised on appeal that were not raised in the trial court, and under our established practice we refrain now from passing thereon.

By the Court. — Order affirmed.

JUDGMENT

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the Second Tuesday, to-wit, on the Tenth day of August A.D. 1954, on the 83rd day of the term, to-wit: On the first day of June A.D. 1955, Present Edward T. Fairchild, Chief Justice, John E. Martin, Grover L. Broadfoot, Timothy Brown, Edward J. Gehl, George R. Currie and Roland J. Steinle, Justices of said Court, the following proceedings were had, Inter Alia, to-wit:

STATE OF WISCONSIN on relation
of JAMES R. MATTISON,

Respondent,

vs.

ALFRED J. BAUDHUIN,

Appellant.

Appeal from Circuit Court, Milwaukee County, State of Wisconsin.

This cause came on to be heard on appeal from the order of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the Circuit Court of Milwaukee County, appealed from in this cause, be, and the same is hereby, affirmed, with costs against the said appellant taxed at the sum of Three Hundred Seven Dollars and Eighty-two Cents ($307.82).

State of Wisconsin, Supreme Court, ss.

I, Gordon Samuelsen, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 10th day of November, A.D., 1955.

s/ Gordon Samuelsen,
Clerk of the Supreme Court
of the State of Wisconsin.

(SEAL)

DEC 10 1955

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 525

STATE OF WISCONSIN, ex rel.
JAMES R. MATTISON,

Appellee,

vs.

ALFRED J. BAUDHUIN,

Appellant.

MOTION TO DISMISS APPEAL AND SUPPORTING BRIEF

WALTER H. BENDER,
Attorney and Special Counsel for Appellee.
213 West Wisconsin Avenue,
Milwaukee 3, Wisconsin.

SUBJECT INDEX

Page

Text of Motion to Dismiss Appeal on the ground that there is no substantial Federal question involved 1

Brief in support of Motion to Dismiss Appeal..... 2

I. Statement of the nature of the case..... 2

The action is one started under Chapter 12, Wisconsin statutes (the state Corrupt Practices Act) to oust appellant from the office of Chairman of the board of supervisors of the Town of Granville, Milwaukee County, Wisconsin, for asserted violations of sec. 12.17, Wisconsin statutes. Appellant demurred to the complaint on the grounds (among others) that the relief sought would infringe his right of free press and deprive him of property without due process of law, in violation of the pertinent provisions of the Federal Constitution..... 2

The circuit court of Milwaukee County overruled his demurrer. The Wisconsin supreme court affirmed this decision and denied appellant's motion for rehearing 2

II. Appellee objects to appellant's statement of jurisdiction and moves to dismiss his appeal because it fails to present a substantial federal question 3

III. Argument 3

There is no substantial federal question presented by the appeal 3

Appellant's contentions apparently are (a) that sec. 12.17, Wisconsin statutes as interpreted and applied by the Wisconsin supreme court deprived him of his right of free press, and (b)

Page

that sec. 12.22(1) and (2) as thus interpreted and applied, violated the due process guaranty.. 3

1. Sec. 12.17, Wisconsin statutes, as thus interpreted and applied, is so clearly valid that appellant's challenge of it as a denial of his right of free press presents no substantial federal question 3

   a. This court, in passing on this challenge, will consider sec. 12.17, Wisconsin statutes, as the Wisconsin supreme court has construed it. The latter court has construed this section as requiring for its violation that the statement as to an opposing candidate be (a) false, (b) known by the maker to be false, (c) intended or naturally tending to affect voting at the election, (d) a statement of alleged fact (as opposed to mere opinion or comment), (e) not of a trivial or inconsequential character, and (f) a statement creating a situation making it impossible to determine the real will of the electors 4

   b. The facts of this case bring it squarely within the foregoing interpretation. The facts are not in dispute for the allegations of the complaint are admitted by appellant's demurrer. Two sets of false statements of fact relative to his opponent in the April 6, 1954, election were sent out in a campaign document, mailed by appellant on April 3, 1955, to 2500 electors. These statements are too

Page

lengthy to outline in this synopsis. Briefly appellant charged, first, that court records showed that his opponent had failed to support his wife and minor children, and, second, that he had joined a conspiracy to annex his town to the city of Milwaukee and thus end its separate existence. The complaint charged and appellant's demurrer admitted that these charges were knowingly false, that they tended to and were intended to induce many electors to vote against appellant's opponent, and that they actually had that effect 6

c. Under these admitted facts, appellant's charge that sec. 12.17, Wisconsin statutes, unconstitutionally denies his right of free press does not present a substantial federal question. This is true wholly aside from the application of the "clear and present danger" rule, because the campaign document was the publication of a libel which falls outside of the area of the protection of the free press guaranty 9

d. Applying the "clear and present danger" rule to the foregoing admitted facts, the publication falls outside the pale of utterances protected by the free press guaranty. The making of wilfully false statements to the electorate tending to mislead them regarding a candidate for public office constitutes, under our form

Page

of government, a grave danger to the state against which it has a right to protect itself. This danger is both "clear" and "present" and was so in the situation which this case presents. The duty of the state to protect its election system outweighs any right of appellant 12

2. It is so clear that secs. 12.22, 12.23 and 12.24, Wisconsin statutes, providing the method of enforcing ouster from office for violation of sec. 12.17, as those sections were construed and applied in this case, do not deprive appellant of property without due process of law that his challenge on this ground presents no substantial federal question 16

a. Appellant is in no position to assert this guaranty because, under the admitted facts, he never acquired any title to the office in question or its emoluments, but was a mere intruder or usurper 17

b. A public office is not such a vested property right as to be entitled to protection under the due process guaranty. This applies also to the emoluments of the office 18

c. The procedure prescribed by Chapter 12, Wisconsin statutes, afforded appellant due process, for it followed the usual and accepted forms of a legal action. The preliminary application to the governor, attorney general or county

Page

judge for authority to begin the action, required by sec. 12.22, Wisconsin statutes, tended to prevent baseless actions. These officers were to act in an administrative capacity and hence appellant could not complain that an *ex parte* application was permitted 20

IV. Conclusion 22

For the reasons stated it is clear that this appeal presents no substantial federal question, either on appellant's claim of denial of the rights of free press, or deprivation of property without due process of law. Hence appellee's motion to dismiss the appeal should be granted 22

Appendix:

Text of Wisconsin statutes involved. These are added for convenience of the court 23

INDEX TO AUTHORITIES

American Communications Association vs. Douds (1949), 339 U.S. 382, 394, 94 L. ed. 925, 941, 70 S. Ct. 674 15

Anderson National Bank vs. Luckett (1944), 321 U.S. 233, 88 L. ed. 692, 704-705, 64 S. Ct. 599, 151 A.L.R. 824 20

Beauharnais vs. Illinois (1952), 343 U.S. 250, 253, 96 L. ed. 919, 925, 72 S. Ct. 725 ..... 4, 10, 11

Bridges vs. California (1941), 314 U.S. 252, 86 L. ed. 192 12

Page

Cafeteria Employes Union vs. Angelos (1943), 320 U.S. 293, 88 L. ed. 58, 60 11

Chaplinsky vs. New Hampshire (1941), 315 U.S. 568, 572, 86 L. ed. 1031, 1035-1036, 67 S. Ct. 766 ..... 4, 11

Cox vs. New Hampshire (1941), 312 U.S. 569, 574, 85 L. ed. 1049, 1052, 61 S. Ct. 762, 133 A.L.R. 1396 15

Dartmouth College vs. Woodward (1819), 4 Wheat. (U.S.) 518, 4 L. ed. 620 20

Davidson vs. New Orleans (1878), 96 U.S. 97, 24 L. ed. 616, 619, et seq. 20

Dodge vs. Board of Education (1937), 302 U.S. 74, 79, 82 L. ed. 57, 62, 58 Sup. Ct. 98..... 19

Donaldson vs. Read Magazine (1947), 333 U.S. 178, 192, 92 L. ed. 628, 642, 68 S. Ct. 591..... 11

Herndon vs. Lowry (1937), 301 U.S. 242, 81 L. ed. 192 12

Higginbotham vs. Baton Rouge (1939), 306 U.S. 535, 538-539, 83 L. ed. 968, 971, 59 Sup. Ct. 705.... 19

Mullane vs. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, 94 L. ed. 865 12

Schenck vs. U.S. (1919), 249 U.S. 47, 63 L. ed. 470.... 12

Snowden vs. Hughes (1943), 321 U.S. 1, 7, 88 L. ed. 497, 502 19

State ex rel. Hampel vs. Mitten (1938), 227 Wis. 598, 607-609, 278 N.W. 431 ..... 4, 5, 13

Page

State ex rel. La Follette vs. Kohler (1930), 200 Wis. 518, 552, 228 N.W. 895, 69 A.L.R. 34 17

State ex rel. Mattison vs. Baudhuin (1955), 270 Wis. 249, 70 N.W. 2d 674 2

State ex rel. Pelishek vs. Washburn (1937), 223 Wis. 595, 270 N.W. 541 6

Taylor vs. Beckham (1900), 178 U.S. 548, 576, 44 L. ed. 1187, 1200, et seq., 20 S. Ct. 890 19

Text Books

McQuillin, Municipal Corporations, 2d ed., sec 436, page 54, and sec. 514, page 235 18

11 Am. Jur., Constitutional Law, sec. 334, page 1145 18

12 Am. Jur., Constitutional Law, sec. 573, pages 267-268 20

12 Am. Jur., Constitutional Law, sec. 650, page 340 .. 18

42 Am. Jur., Public Officers, sec. 9, pages 886-887 18

Wisconsin Statutes

Sec. 12.17 ..... 2, 3, 4, 5, 6, 9, 10, 12, 13, 17, 19

Sec. 12.24 ..... 2, 9, 16

Note: The full text of the foregoing statutes and certain other Wisconsin statutes referred to in the brief are set forth in full in the Appendix.